91-68

Supreme Court, U.S.
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CASE NO. _____

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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LAWRENCE E. MILLER,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR THE WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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Herbert Creech, Jr.
Attorney for Petitioner
1422 Chapel Street
Dayton, Ohio 45404
1-513-228-1086

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## STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE SENTENCING GUIDELINES WERE IMPROPERLY APPLIED BY THE SENTENCING COURT IN THIS CASE WITH THE RESULT THAT THE APPELLANT WAS DENIED DUE PROCESS OF LAW AND THE SENTENCING HEARING WAS INCOMPLETE AND MUST BE EXPANDED UPON REMAND.

II. WHETHER THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

III. WHETHER THE GUIDELINES UNDER WHICH APPELLANT WAS SENTENCED ARE UNCONSTITUTIONAL IN THAT THEY WERE PROMULGATED IN A MANNER WHICH VIOLATES THE DOCTRINE OF SEPARATION OF POWERS AND WHICH ALSO INVOLVES AN EXCESSIVE DELEGATION OF LEGISLATIVE POWER FROM THE UNITED STATES CONGRESS TO THE SENTENCING COMMISSION.

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## CITATION TO OPINION BELOW

The opinion issued by the Court of Appeals was not published, but is succinct and is attached hereto and incorporated herein by reference and is labeled Appendix A.

## JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was issued April 3, 1991, and a motion for stay having been denied, the mandate

was subsequently issued May 22, 1991. Jurisdiction is invoked per 28 USC 1257(3) in that petitioner was deprived of rights secured to him by the United States Constitution, *see also*, 28 USC 1254(1), 2101(c), and the Rules of this Supreme Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sentencing Guidelines promulgated by the United States Congress.

2. The "due process clause" of the Fourteenth Amendment to the Constitution of the United States.

3. The Sixth Amendment to the United States Constitution.

## BASIS OF FEDERAL JURISDICTION IN THE FIRST INSTANCE

It was alleged the petitioner violated 18 USC 2314 and 2.

## STATEMENT OF THE CASE AND FACTS

The record will show that on or about June 1, 1989, the U.S. Government caused to be filed herein an information charging the petitioner with a violation of 18 USC 2314 and 2. On June 6, 1989, he entered his plea of guilty and the plea agreement and waiver of indictment were filed. The record will show that he objected to the monetary amount the government had placed on the stolen goods in question, but that on July 20, 1990, was sentenced to thirty seven months actual incarceration, a substantial fine ($50,000.00), a special assessment ($50.00), three years supervised release, restitution in an amount left for future determination, and three hundred hours of community service. The actual judgment of sentence was filed on July 25, 1990, and the memorandum of

sentencing hearing filed July 26, 1990, which recorded that petitioner and his attorney in open court objected to the terms of the pre-sentence investigation which mandated a four-point enhancement in offense level because it alleged he had been "in the business of selling stolen property," as well as having objected, *supra*, to the monetary value the government placed on the stolen goods. (Other aspects of the case will be noted as necessary and in the context of the arguments in the interest of brevity and clarity as needed to make plain the position before this Honorable Court.)

## REASONS FOR GRANTING THE WRIT IN THIS CASE

1. To give this Court the opportunity to reconsider its* position on the Federal Sentencing Guidelines in light of a major new Congressional study concerning the matter.

2. To give the Court the opportunity to realize that the right to due process of law guaranteed by the Federal Constitution is violated when the amount of cocaine is considered for guideline pruposes in drug cases, but the amount of money is not so considered in the same way in "theft" cases; and that the guidelines were accordingly grossly misapplied in this case.

3. That in this instance the trial attorney of petitioner was in gross and blatant violation of the standards of effectiveness of assistance demanded by the Sixth Amendment to the Federal Constitution.

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* (One federal judge has already resigned in protest over the guidelines, American Bar Association Journal, November 1990, p. 41, and they have been critically referred to as "The Most Fundamental Change in the Criminal Justice System," ABA Criminal Justice (section) Magazine, volume 5, number 3, p. 2, Fall, 1990.)

## FIRST ARGUMENT

### THE SENTENCING GUIDELINES WERE IMPROPERLY APPLIED IN THIS CASE WITH THE RESULT THAT PETITIONER WAS DENIED DUE PROCESS OF LAW AND THE SENTENCING HEARING WAS INCOMPLETE AND MUST BE EXPANDED UPON REMAND.

It is at this late date beyond peradventure that the federal sentencing guidelines must be applied by trial courts, and be supported in the record by proof standing at a preponderance of the evidence, *US* v. *Carroll*, 893 F2d 1502 (6th Cir. 1990), and that if this is not properly done, remand to the trial court by the appellate courts is necessary in order to insure that justice is done, *US* v. *Brewer*, 899 F2d 503 (6th Cir. 1990). For the appellate courts to tolerate any less of a standard would be a denial of due process of law to the sentenced individual, a denial of constitutional dimension, *US* v. *Walton*, 908 F2d 1289 (6th Cir. 1990).

Petitioner was convicted upon his plea of guilty to an information charging him with a violation of 18 USC 2314 and 2, and sentenced as outlined in the "statement of facts", *supra*. The gist of the complaint was that he transported in interstate commerce for the purpose of selling them a great number of "compressors" and various manufactured component parts. It was alleged that the items had been stolen by employees directly from a factory (hence, an "inside" job), who in turn sold them to petitioner who in turn sold them after transporting them through interstate lines. At the time of the offense, petitioner was in his middle fifties and had no prior criminal record. Thus, under the sentencing guidelines, he began with a basic offense level of "4".

### A. The "Obstruction of Justice" Enhancement.

Under Guidelines 3C1.1, petitioner received an increase of 2 offense levels because it was alleged that he obstructed justice in not fully co-operating with the government con-

cerning the return of some of the stolen property. It appeared that he failed to inform the government, after pledging to be co-operative of the existence of a certain trailer full of some of the stolen property until after the government knew about the property anyway; thus, demonstrating untruthfulness and unfaithfulness to his plea bargain/agreement. So, his offense level was enhanced by 2. Petitioner's explanation, of which he was apparently not able to convince the government, was that his trial counsel had advised him upon initial contact with the counsel not to reveal the whereabouts of the trailer and stolen merchandise in question. Whether or not this was true, and there appears no way to so determine, it is undisputed that he was co-operative in every other way, and when asked to unlock the trailer after the government became otherwise aware of it, did so unhesitatingly and without apparent trepidation. Regarding this particular enhancement section, it is said that, "In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant," Commentary, Application Notes: 2.," 18 USC App, 3C1.1. It thus appears that the 2 level enhancement given under this portion of the guidelines is not deserved, represents misapplication of the law by the trial court, and thus should be reversed.

**B. The "Person in the Business" Enhancement.**

Under guidelines 2B1.2(b)(3)(A), petitioner received a 4 level offense enhancement because the government considered him a "person in the business of receiving and selling stolen property." The records shows that at all times relevant herein, petitioner was occupied in a full time job not related to the conduct in question in this case and that there is no evidence at all, much less to the required preponderance of the evidence standard, that he ever operated as a traditional "fence" or was otherwise in any way in the "business" as such of selling stolen property and that if this particular enhancement is applied to him under the circumstances of record in this case, not only will that be a significant miscarriage of justice in this particular matter, but it would be very difficult

to even imagine any instance where this enhancement would not apply to anyone who ever sold anything stolen, which would be clearly arbitrary and contrary to the proportionality and fairness doctrine and spirit of the guidelines, in that this guideline enhancement is clearly not meant to automatically apply to absolutely all violations of 18 USC 2314 and 2. Thus, this enhancement should also be reversed.

**C. The "Valuation of the Property" Enhancement.**

The greatest enhancement received under the guidelines in this case, was a 13 level enhancement thought necessary due to the great monetary value attached to this property. Some major reasons why this enhancement should be reversed are found in "ARGUMENT II," herein, *infra*. Even so, as it stands the enhancement is not supported by a preponderance of the evidence of record as required by law and needs be reversed on that account as well. The reason for this is that the trial court used without question, as the record will show, the corporate victim's *estimate* of *retail* value for purposes of this enhancement instead of "fair market value" which the law seems to require as the standard in other contexts, *see*, *US* v. *Perry*, 638 F2d 862 (5th Cir. 1981), or the measure of "reasonable replacement cost to the victim" specifically required here, *viz.*:

> " 'loss' means the value of the property taken . . . ordinarily . . ., the fair market value of the particular property at issue . . . the court may measure loss . . . as *reasonable replacement cost* to the victim . . . the value of property taken plays an important role in determining sentences for theft offense, because it is an indicator of both harm to the victim and gain to the defendant," (emphasis added), Commentary, Application Notes: 2., 18 USC App. Ch. 2 (1990).

Thus, "reasonable replacement cost to the victim" is the legal standard here. It is related to "fair market value" under the

facts and circumstances, economically considered, of each case, as needfully established as a matter of record by a preponderance of the evidence. It has nothing at all to do with "retail" value to the victim, especially as here where the victim is not a retailer, not even a wholesaler, *per se*, but in fact a manufacturer in whose circumstances use of value at "retail" amounts to nothing more than a windfall supposition, but which concept if incorrectly applied to a defendant, as was done here, enhances the offense level far out of all proportion to the intent or a fair reading of the guidelines. This record contains blatant and obvious error in this regard. Moreover, and rather egregiously, the value used for enhancement here, is not only retail, but merely the victim's "estimate" of that retail. That is an error sandwich, layer on layer. If an "estimate" of drug quantity is an improper way to apply the guidelines to a "drug" defendant, as it is, *US* v. *Walton*, *supra*, then *ipso facto* an "estimate" is also an improper way to apply the guidelines to a "money" defendant as we have here. Thus, the 13 levels enhancement relative to monetary valuation does not meet proper legal standards as applied by this Court, and must be disallowed here, although on remand the trial court will, of course, assign in some rational way a value to the loss occasioned and that is understood.

It is easy to see how improper sentencing has harmed the petitioner. When the clearly improper enhancements for "being in business" and "obstruction of justice" are removed, and he is given the two positive credits the trial court allowed him, and his basic offense level due to a past good record is only 4, his real offense level for sentencing purposes, even allowing the excessive 13 for improper valuation of loss, is between 2 and 15 (or somewhere between 0-6 months as opposed to 18-24 months actual incarceration). And when new or more or different proof on remand is offered according to the proper preponderance of the evidence standard as required by law, he believes the "excessive 13" would drop significantly; thus, amounting to a substantially lower

sentence than what the trial court imposed, and, this being the requirement of the law, it is submitted that the sentencing here should be reversed and remanded. *See also*, ARGUMENT II, and the propositions advanced therein, *infra*.

## SECOND ARGUMENT

### APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

At this late date, it is axiomatic that the right to counsel contained in the Sixth Amendment to the United States Constitution clearly implies and guarantees the right to effective counsel; thus, any ineffectiveness on the part of a defendant's counsel will vitiate the validity of his conviction (or, by implication, as here, the validity of his sentence), *Strickland* v. *Washington*, 466 US 668 (1984). What constitutes effective assistance of counsel under this exacting standard is found in *US* v. *Bavers*, 787 F2d 1022 (6th Cir. 1985), and is:

> ". . . defendant must make an affirmative showing not only that his counsel failed to perform at least as well as a lawyer with ordinary training and skill in criminal law, a "reasonable performance test,' but also that 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,' a prejudice standard," *Bavers*, at 1030.

Petitioner had a basic offense level of 4 and was only in Criminal History Category 1. Thus, for the sake of argument, even assuming the government position is correct with regard to enhancements for "being in business" and "obstructing justice," it is still painfully clear that the greatest enhancement by far (*ie.*, from 4 for basic offense + 4 for "being in business", or 8, up to level 21, for a total enhancement *of 13 points altogether*!) had to do with the single factor of the dollar value placed on the goods. This factor alone, giving the government every conceivable benefit of the doubt in this case, raised the range under the guidelines from 2 to 8 months incarceration (for level 8) to from 30 to 37 months incarceration (for level 19), which was actually received, a very substantial increase and thus one to which defense counsel should have been especially alert inasmuch as all turned on

the dollar amount placed on the goods being determinative of how long a period of loss of liberty petitioner would and did receive. Such a major factor certainly should have received more than cursory attention from trial counsel. (Indeed, had the guidelines been properly applied here, petitioner would have been eligible for probation, *see*, 18 USC App. Ch.5, sec. 5B1.1.)

Counsel below had a duty to do more than he did with regard to questioning the dollar amount placed on the goods at issue here. Not only would effective assistance in a case such as this require greater questioning of the value placed on the goods by the government, but it is suggested that counsel had a clear duty to go even further and present direct evidence into the record concerning the dollar value so the trial court would have had a clear and justifiable reason to depart from the recommendation of the government. Some preliminary discussion is needed to establish why this is so.

The proof upon which a sentence under the guidelines is based must be established in the trial court record by a "preponderance of the evidence" standard, *US* v. *Carroll*, 893 F29 1502 (6th Cir. 1990), *US* v. *Castro*, 908 F2d 85 (6th Cir. 1990), (which such proof is totally lacking here). It is also true that where mitigating and aggravating factors, for whatever reason, are not properly considered by the trial court, remand is necessary to insure that justice is done under the guidelines, *US* v. *Brewer*, 899 F2d 503 (6th Cir. 1990), *US* v. *Robinson*, 898 F2d 1111 (6th Cir. 1990). The ambiguity with regard to the dollar amount used for value makes it clear that remand is necessary under these rules to insure that justice is done in these cases, and in the present case in particular.

The tragic and clear failing in this case was allowing the government, without even so much as attempting to present other evidence or moving the court to allow it, in the proceedings below to use a *retail value* figure presented by the *victim corporation without question* to be used as the figure for selecting the enhancement level under the sentencing

guidelines. There was *no* evidence here that the property should have been rightfully valued by the victim at "retail". To the contrary, the clear suggestion on the record considered as a whole is that the victim was not a retailer, but a wholesaler supplier, or even further back on the economic chain, a basic manufacturer of these goods. In no instance should "retail" value have been used here. A better value would have been "cost to manufacturer" or "market value" or "replacement" or "wholesale" value. Counsel should have realized this at trial level, and, at any rate, had a duty under the applicable standard, to at least (1) challenge the government's method of evaluation and (2) move the court to take evidence, from defendant's expert or other witnesses or defendant himself on the matter of evaluation. Not to have done so here, where so very much enhancement was based on that questionable dollar value, clearly was not effective assistance.

> "The general test for determining the market value of stolen property is the price a willing buyer would pay a willing seller either at the time and the place the property was stolen or at any time during the receipt or concealment of the property . . . the value . . . is a jury question . . . . .," *US* v. *Perry*, 638 F2d 862, at 865 (5th Cir. 1981).

This is certainly a far cry from evaluation at "retail" by a representative, unquestioned, of the corporate defendant and that is a clear miscarriage of justice in the premises.

The question arises as to whether counsel would have had any reason to question, for purposes of effectiveness in legal assistance, the valuation in dollars of the stolen property. Indeed, yes is the answer. It has been held that the "amount" of cocaine with which a defendant is allegedly involved, where properly brought into question on appeal, justifies a remand for finding further facts in order to determine if the sentencing guidelines were fairly applied to a defendant, *US* v. *Silverman*, 889 F2d 1531 (6th Cir. 1989), *US* v. *Castro*, *supra*. If the Court is so determined to make sure the proper "amount" of

cocaine is viewed for purposes of sentencing, it must be equally as vigilant to see that the proper "amount" of dollars is viewed for sentencing as well; after all, the interest from the point of view of all concerned, not least of whom is the defendant, is exactly the same inasmuch as the quantity (of dollars or drugs — all economic relations and concepts) at stake will determine the sentence given in very large degree. With regard to *drug* quantity:

> "If the exact amount cannot be determined, an estimate will suffice, but here also, a preponderance of the evidence must support the estimate . . ., a court must err on the side of caution . . . this standard allows a District Court to perform its traditional fact-finding mission . . . Allowing a court to find a defendant responsible for the maximum quantity of drugs that can plausibly be found could result in defendants receiving excessive sentences based on a finding of quantity that is more likely than not excessive. Such a result would violate a defendant's due process rights. *See Townsend* v. *Burke*, 334 US 736 . . . (1948) (sentences may not be based on "materially false" information); . . . this . . . is nonetheless constitutionally required to prevent excessive sentences," *US* v. *Walton*, 908 F2d 1289, at 1302 (6th Cir. 1990).

It is inconceivable that a court would not require the same standard on "money quantity" that it requires on "drug quantity" and just as inconceivable that (1) a lawyer with ordinary skill and training in criminal law would not realize this (the 'reasonable performance test' of *Bavers, supra*) or that (2) counsel's dereliction in this regard so clearly undermines the functioning of the adversarial process that the trial court result cannot be relied on as having produced a just result (the 'prejudice standard test' of *Bavers, supra*).

Thus, in the instant matter, the failure of trial counsel to either present evidence of his own regarding the value of the goods in question and/or to at least attempt to challenge, ques-

tion or discredit the static "retail" sum offered by the government violated the double-pronged test of the *Bavers* decision so that petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States which can only be corrected by a remand to the trial court for a new sentencing hearing where evidence favorable can be presented on the valuation matter and the government will have to justify the sum it uses by a preponderance of the evidence standard as required by law.

## THIRD ARGUMENT

**THE GUIDELINES UNDER WHICH APPELLANT WAS SENTENCED ARE UNCONSTITUTIONAL IN THAT THEY WERE PROMULGATED IN A MANNER WHICH VIOLATES THE DOCTRINE OF SEPARATION OF POWERS AND WHICH ALSO INVOLVES AN EXCESSIVE DELEGATION OF LEGISLATIVE POWER FROM THE UNITED STATES CONGRESS TO THE SENTENCING COMMISSION.**

It is true that the constitutionality of the sentencing guidelines against this very challege was upheld in *Mistretta* v. *US*, 57 USLW 4102 (U.S. Sup. Ct. 1989). However, under the ethical rules which constrain the profession, a lawyer may argue in good faith for a change or modification of what is or is thought to be existing law, and it is respectfully submitted that the time is now ripe for this Court to adopt outright the dissenting opinion of Justice Scalia in the *Mistretta* case. The guidelines are unwise, unworkable and unworthy of a system of jurisprudence in a great nation.

In 1988, at the direction of the United States Congress, the Chief Justice of the United States appointed a distinguished committee of Judges, Federal Legislators, lawyers and scholars to conduct an in-depth study of the problems of the federal courts and make a report to the Congress and the President. The requested special detailed "Report of the Federal Courts Study Committee" (hereinafter, "Report") was finished and presented to the President and the Congress on April 2, 1990, being printed and distributed by, among others, the Administrative Office of the United States Courts and the Government Printing Office.

The Report had a number of significant things to say about the "sentencing guidelines" promulgated by the United States Sentencing Commission, among them that: the minimum mandatory sentences conflict with the intent of the Congress,

p. 134; the guidelines are general non-compulsory standards and their strict application causes specific administrative difficulties for the Federal Courts, p. 135; the guidelines should be amended to increase flexibility and to make the sentence better fit the offender, pp. 136-139; the role of probation officers is distorted under the guidelines system, p. 138; the Congress should now re-evaluate the manner in which the guidelines become law, that is, by the Congress taking no action as opposed to affirmatively legislating, which is their constitutional duty, p. 140. The Special Committee specifically recommended that mandatory minimum sentences should be repealed and that the whole matter of how the guidelines are promulgated should be reconsidered with a view to change in the system, pp. 182-183.

It is suggested that the above aspects of the Report cited here indicate no less than a recognition by the Special Committee, implicitly if not explicitly, that the position taken by Justice Scalia's dissent in *Mistretta* is correct when viewed in light of present experience regarding the guidelines system as well as in light of constitutional concerns, properly considered, relative to the doctrine of sparation of powers and the illegitimacy of excessive delegation by the Congress to the Sentencing Commission of its proper legislative function. It is respectfully submitted that when these matters are re-argued to the Supreme Court that in light of present knowledge, Justice Scalia's dissent will become the majority opinion.

## CONCLUSION AND RELIEF REQUESTED

THEREFORE, based upon the arguments contained herein, the authorities cited in support thereof, and in the interest of the administration of justice, this Court should declare the sentencing guidelines under which appellant was sentenced to be contrary to the United States Constitution, and therefore void and of no effect and order the trial court to re-sentence the petitioner at a future hearing without regard to said guidelines; alternatively, this Court should hold that petitioner was denied the effective assistance of counsel and that, even if valid, the sentencing guidelines were not properly applied to the case at hand, and so remand this matter to the trial court for re-sentencing in accordance with such a holding herein as will instruct the trial court in the proper way to apply the guidelines in a case such as this one.

RESPECTFULLY SUBMITTED.

HERBERT CREECH
Attorney For Petitioner.

## APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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No. 90-3655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LAWRENCE E. MILLER,
Defendant-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO**
(Filed April 3, 1991)

Decided and Filed _____

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM. Defendant-appellant Lawrence E. Miller has appealed form the sentence imposed in a judgment entered

pursuant to guilty plea of the United States District Court for the Southern District of Ohio for interstate transportation of stolen property in violation of 18 U.S.C. § 2314. Upon review of the appellant's assignments of error, the record in its entirety, the briefs of the parties, and the arguments of counsel, this court concludes that the appellant's assignments of error are without merit.

Accordingly, the judgment of the district court is AFFIRMED for the reasons stated by the district court from the bench at the sentencing hearing on July 20, 1990.